No. SC86534

IN THE
MISSOURI SUPREME COURT

MICHAEL TISIUS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Boone County, Missouri
13th Judicial Circuit, Division II
Honorable Gary D. Oxenhandler, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the partial denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Boone County. The convictions sought to be vacated were for two counts of murder in the first degree, § 565.020, RSMo 2000, and for which appellant was originally sentenced to death. The post-conviction motion was denied as to the guilt phase of appellant's trial, but granted as to the penalty phase of appellant's trial, and appellant's death sentences were set aside; thus, this appeal only pertains as to the denial of post-conviction relief relating to appellant's guilt-phase claims. As appellant's death sentences have been set aside, appellant is no longer under a sentence of death. Further, this appeal does not involve any of the other categories reserved for the exclusive appellate jurisdiction of this Court. Therefore, jurisdiction properly lies in the Missouri Court of Appeals, Western District. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Michael A. Tisius, was charged by information in the Circuit Court of Randolph County with two counts of first degree murder, and one count each aiding the escape of a prisoner, first degree burglary and armed criminal action (L.F. 13-15).[1]

[1]The record on appeal consists of the original trial record contained in this Court's file from appellant's direct appeal, including the original trial transcript ("Tr."), legal file ("L.F."), a supplemental legal file ("Supp.L.F."), a second supplemental legal file ("2nd Supp.L.F."), and various state's exhibits ("St.Exh.") and defendant's exhibits ("Def.Exh."); and the record from the post-conviction proceding, including the post-conviction legal file ("PCR L.F."), evidentiary hearing transcript ("PCR Tr.") and various Movant's exhibits ("Mov.Exh."). Respondent requests that this Court take judicial notice of its file in appellant's direct appeal, State of Missouri v. Michael A. Tisius, SC84036.

By consent of the parties, a change of venue was granted to the Circuit Court of Boone County (L.F. 31-32). Appellant's trial on the two counts of first degree murder began on July 30, 2001 before the Honorable Frank Conley with the selection of a jury from St. Charles County (Tr. 121). The charges of aiding the escape of a prisoner, first degree burglary and armed criminal action were later *nolle prossed* by the state (L.F. 260).

The facts of the underlying offense were stated by this Court on direct appeal as follows:

> In early June of 2000, Appellant and Roy Vance were cellmates at the Randolph County Jail in Huntsville, Missouri. Appellant's sentence lasted thirty days, and Vance told Appellant he would be in jail for some fifty years. As such, Appellant and Vance discussed various schemes where Appellant would return to jail to help Vance escape. In one of those plans, Appellant was to return to the jail with a firearm, force the guards into a cell, and give the gun to Vance, who would then take charge and release all of the inmates.
>
> The Randolph County Jail was a two-story brick building that had been converted from a house. The front door of the jail was kept locked, and the officers could remotely open the door when visitors rang a doorbell. Inside the front door was a small foyer, and to the right behind a

counter was the dispatch area where the officers were stationed. A hall led from the dispatch area to the jail cells in the rear of the building.

Appellant was released on June 13, 2000. Shortly after his release, Appellant contacted Vance's girlfriend, Tracie Bulington, who said that she wanted to go through with the escape plan. Four days later, Bulington drove from Macon to Columbia with a woman named Heather Douglas to pick up Appellant and drive him back to Macon; Appellant and Bulington stayed at Douglas' home for four or five days. During the ride to Columbia, Douglas heard the two discuss various ways of breaking Vance out of jail, including the idea of locking the jailers in a cell. They told Douglas they were joking. Douglas testified that over the days to follow, she heard Appellant and Bulington say that they were "on a mission," but they would not elaborate. Appellant and Bulington also described taking cigarettes to Vance at the jail and of having gotten information from a "stupid deputy." At other times they would stop talking when Douglas entered the room. Douglas also testified that Appellant and Bulington kept a stereo, clothing and camping gear in Bulington's car and

that she also saw a pistol in Bulington's car.

Beginning June 17, 2000, and continuing over several days, Appellant and Bulington visited the jail several times. At or around 1:30 a.m. or 2 a.m. one of those mornings, they were admitted in the front door and delivered a pack of cigarettes to an on-duty officer, requesting that it be given to Vance. A day or two later, Appellant and Bulington returned to the jail with a pair of socks for Vance and asked questions about his upcoming court date.

Bulington testified that each delivery signified to Vance certain facts, such as that Appellant had made it to town or that the jail break would not occur the night of the delivery. During some of those visits, Appellant kept a .22 caliber pistol that Bulington had taken from her parents' home in the front of his pants. Appellant had tried to acquire a bigger gun than the one Bulington took. On the night of one of their visits, one officer testified that the Appellant and Bulington were acting "real funny," nervous and erratic, such that he wrote a police report about the visit.

Appellant tested the gun by firing it outside of Bulington's car window while the two were driving on country

roads on June 21, 2000. Later that evening, Appellant and Bulington[2] drove around listening to a song with the refrain "mo murda" (more murder) as they prepared to get Vance out of jail. Appellant rewound the cassette and played the "mo murda" song over and over. Appellant told Bulington "it was getting about time" and that "he was going to go in and just start shooting and that he had to do what he had to do." Appellant also said he would go "in with a blaze of glory."

At 12:15 a.m. on June 22, Appellant and Bulington returned to the Randolph County Jail, rang the doorbell and were admitted. Appellant again carried the pistol in his pants. Appellant and Bulington told the officers they were delivering

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[2]The original opinion notes that Bulington only testified in the penalty phase, so any testimony that came from Bulington was not considered in determining the sufficiency of the evidence. Tisius, 92 S.W.3d at 758 n. 3.

cigarettes to Vance. The two officers present were Leon Egley and Jason Acton. Appellant made small talk with one of the officers for about ten minutes, discussing what Appellant was planning to do with his life and how Appellant was doing. Bulington testified that at that point, she was about to tell Appellant she was ready to leave but froze as she noticed Appellant had the gun drawn beside his leg. Appellant then raised his arm with the pistol drawn and, from a distance of two to four feet, shot Acton in the forehead above his left eye, killing him instantly. Egley began to approach Appellant, and about ten seconds after he killed Acton, Appellant shot Egley one or more times from a distance of four or five feet, until Egley fell to the ground. Both officers were unarmed.

Appellant then took some keys from the dispatch area and went to Vance's cell. Appellant could not open the cell, so he returned to the dispatch area to search for more keys. While Appellant was in the dispatch area, Egley grabbed Bulington's legs from where he was lying on the floor, and Appellant shot him several more times at a distance of two or three feet. Egley suffered five gunshot wounds, three to the forehead, a graze wound to the right cheek and a wound to

> the upper right shoulder. Not long afterwards, police found Egley gasping for air and a heard gurgling sound; he was surrounded by a pool of blood. Egley died shortly afterwards.
>
> Appellant and Bulington fled in her automobile. Appellant threw the keys from the dispatch area out of the car window on the way out of town. Bulington threw the pistol from the car window while crossing a bridge on Highway 36. After the two had passed through St. Joseph and crossed the Kansas state line, Bulington's car broke down. Later that day, the two were apprehended by the police, and the keys and gun were recovered. After having waived his Miranda rights, Appellant gave oral and written confessions to the murders.
>
> Appellant's theory at trial was that he was guilty at most of second-degree murder because although he admits that he shot and killed the two officers, he argues that he did so without deliberation.

State v. Tisius, 92 S.W.3d 751, 757-759 (Mo.banc 2002), cert. denied 539 U.S. 920 (2003). At the close of the evidence, instructions, and arguments of counsel, the jury found appellant guilty of two counts of first-degree murder (Tr. 949-951; Supp.L.F. 21-22). At the penalty phase, the State called witnesses to present victim impact testimony, testimony that appellant had made a "shooting" motion with his hand at a jail

guard while confined in a Missouri jail shortly after his apprehension, and the testimony of Bulington, who provided further details about the murder (Tr. 970-1063). Appellant called eleven witnesses to provide mitigation evidence (Tr. 1064-1240).

At the close of the penalty phase evidence, instructions, and arguments of counsel, the jury recommended sentences of death for both murders, finding one statutory aggravating circumstance in the murder of Deputy Acton and three in the murder of Deputy Egley (Tr. 1298-1300; Supp.L.F. 39-40). The court sentenced appellant in accordance with the jury's decision (Tr. 1303-1306). On direct appeal, this Court affirmed appellant's convictions and sentences. Tisius, 92 S.W.3d at 757, 771.

On April 24, 2003, appellant timely filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 31-36). Appointed counsel later filed a lengthy amended motion raising numerous claims of ineffective assistance of counsel by trial attorneys David Kenyon and Jeff Estes and appellate counsel Deborah Wafer (PCR L.F. 95-388). An evidentiary hearing was held on appellant's amended motion, at which appellant presented in-court testimony from Mr. Kenyon, Mr. Estes, and Ms. Wafer, and numerous other witnesses, as well as depositions (including one of Ms. Wafer concluding her testimony), stipulations, and other exhibits to support his claims (PCR Tr. 1-873).

On November 4, 2004, the motion court submitted findings of fact and conclusions of law denying appellant's motion as to guilt phase claims, but granting two penalty phase claims, and remanded the case for a new penalty phase (PCR L.F. 458-556). This

appeal of the motion court's judgment as to the guilt phase claims follows.

ARGUMENT

I.

The motion court did not clearly err in denying appellant's claims of ineffective assistance of trial counsel or appellate counsel in failing to object or raise a claim of prosecutorial misconduct regarding allegedly false and misleading testimony and argument because appellant failed to prove that trial counsel was ineffective in that he failed to prove that the challenged testimony or argument were false and misleading or that the prosecutor presented any allegedly false statements knowingly, and his claim of failure to preserve error is not cognizable under Rule 29.15. Further, appellate counsel was not ineffective as appellant's claim was not preserved for appeal and would have not required reversal if raised.

Appellant claims that there was prosecutorial misconduct in the admission of testimony and in argument regarding the theft of the handgun used in the murders (App.Br. 27-28, 31-32, 35). Appellant argues that the prosecutor knowingly presented "false and misleading" evidence and argument suggesting that he, and not accomplice Tracie Bulington, had stolen the gun from Bulington's mother's residence (App.Br. 29-32). Appellant contends that either trial counsel was ineffective for failing to properly object to the evidence and argument or that appellate counsel was ineffective for failing to raise the issue on direct appeal (App.Br. 33-35).

A. Facts

Prior to trial, Tracie Bulington told police that on the night of June 18, 2000, after dropping off cigarettes for Vance at the Randolph County Jail, she and appellant arrived at her mother's house (Mov.Exh. 13 p. 8-9). She said that appellant had gotten drunk earlier that day and wound up passing out in a chair soon after arriving (Mov.Exh. 13 p. 9). Bulington talked to her mother, Patsy Bulington[3], for a while, then wound up falling asleep on the floor (Mov.Exh. 13 p. 9). The next morning, while appellant was still asleep, Bulington went to use her mother and father's bathroom, stopping to get the gun used in the murders from a "wardrobe-type thing" and then took the gun out to the car (Mov.Exh. 13 p. 9). After that, Mrs. Bulington asked Bulington if she wanted to go to town with her, so Bulington went with her mother, leaving appellant asleep in the house (Mov.Exh. 13 p. 9). After returning from town, Bulington and appellant left (Mov.Exh. 13 p. 9).

In her pretrial deposition, Bulington testified that Vance repeatedly asked Bulington during telephone calls to get a gun for the escape, but also told her that appellant was to

[3]Respondent will refer to Patsy Bulington either by her entire name or as "Mrs. Bulington" and Tracie Bulington, as throughout the brief, either by her entire name or simply as "Bulington."

get the gun, which matched what appellant told her (Mov.Exh. 9 p. 24, 26-27, 32, 45). She testified that appellant spoke of plans to obtain a gun (Mov.Exh. 9 p. 47-48). She said that appellant finally obtained a gun from her when she stole it from a "wardrobe thing" in her parents' house (Mov.Exh. 9 p. 49). She testified that she gave appellant the gun after stealing it and he kept it under the passenger seat of the car (Mov.Exh. 9 p. 57).

In the guilt phase of trial, Patsy Bulington testified that, two or three days prior to the shootings, appellant and Bulington were at her home for six to eight hours (Tr. 697-698). On direct examination, the following questioning occurred:

> Q. Were you there with your daughter and the defendant the entire six hours or so that they were in your home?
>
> A. No.
>
> Q. Why is that?
>
> A. I had gotten a grandchildren's child support that morning and went to town to get some things they needed.
>
> Q. Did that leave the defendant and your daughter alone in your home?
>
> A. No, because the daughter went to town with me.
>
> Q. All right. So who was left at your home?
>
> A. Just him.

Q. Just him, who do you mean?

A. Mike

Q. The defendant?

A. Yes.

(Tr. 698-699). Mrs. Bulington then testified that she and her husband had a .22 caliber pistol they kept in the wardrobe of her bedroom, and that, later on the morning of the murders, her husband called her and asked her to look for it (Tr. 699-701). She stated that when she looked, she discovered that the gun was missing from the wardrobe, as well as a box of .22 caliber ammunition (Tr. 700).

In the rebuttal portion of guilt-phase closing argument, prosecutor Ahsens stated, "Let's talk just about deliberation. This weapon was taken by stealth. We know that because Patsy Bulington told us that" (Tr. 940). Appellant objected that this was a "misstatement of the evidence," to which the prosecutor replied, "Reasonable inference" (Tr. 940). The objection was overruled (Tr. 940).

Tracie Bulington, who had not testified during the guilt phase, testified in the penalty phase that she got the gun from the wardrobe in her father's bedroom without her parents knowledge that she was taking it (Tr. 1018-1019).

In his amended motion, appellant alleged that the State violated his due process rights when it "presented false and misleading testimony and argument during the guilt-phase portion of trial that falsely suggested that Michael had obtained the gun for the offense by stealth, and therefore, had deliberated" (PCR L.F. 98). Appellant alleged that

the prosecutor's argument was false and misleading because it "implied" that appellant had personally taken the gun instead of Bulington (PCR L.F. 101). He alleged that the prosecutor knew that "his suggestion" was false because of Bulington's pretrial statements that she had taken the gun (PCR L.F. 102). Appellant also alleged ineffective assistance of trial counsel for not objecting on the grounds of prosecutorial misconduct, thus failing to preserve the matter for appeal, or alternatively, ineffective assistance of appellate counsel for failing to raise this issue if trial counsel's argument was sufficient to preserve the issue (PCR L.F. 104-105).

In her deposition taken in lieu of live testimony at the evidentiary hearing, Bulington again affirmed that she had taken the gun from her parents's house because Vance asked her to obtain a gun, and that appellant was "passed out" in a recliner at the time (Mov.Exh. 43 p. 5-8).

At the evidentiary hearing, trial counsel Estes, who was primarily responsible for the guilt phase evidence and argument, testified that he had all of Bulington's pretrial statements in which she told the police that she, and not appellant, had taken the gun from her parents' house (PCR Tr. 526-529). Counsel testified that he thought the prosecutor's argument was improper, and that his objection of "misstatement of the evidence" was "the reason that I thought of off the top of my head" (PCR Tr. 533). He testified that he did not think to object on the grounds that the argument was "false and misleading" and that there was no reason he would not have wanted to make that objection (PCR Tr. 533).

Appellate counsel testified that she did not raise the claim because the prosecutor's argument was supported by the evidence, and appellant's claim was not preserved for appeal, as there was no claim or objection that would have allowed her to raise it (PCR Tr. 378-382).

Prosecutor Ahsens testified that, prior to trial, Bulington had said that she obtained the gun from the house before leaving the house with her mother (PCR Tr. 470-471). He testified that there had been "considerable pursuit" of another gun by appellant before she took the gun (Tr. 470-471). He testified that he had Bulington's statement prior to trial (PCR Tr. 473).

The motion court denied appellant's claim, finding that the prosecutor's argument that the gun was taken by stealth was supported by the evidence, as the prosecutor never said that appellant was the one who had personally taken the gun, but merely that the gun was taken without Mrs. Bulington's knowledge (PCR L.F. 465-466). The court found that the reference to the gun being taken by stealth indicated deliberation by the appellant, Vance, and Bulington in the preparation for the murders (PCR L.F. 466). The motion court also found that appellant's claim of ineffective assistance of trial counsel for failing to preserve was not cognizable and that appellant suffered no prejudice due to the strength of the guilt phase evidence and the fact that the argument was one isolated comment (PCR L.F. 466-467).

B. Independent "Prosecutorial Misconduct" Claim is Not Cognizable

While appellant's point relied references error only in the finding of no ineffective

assistance of trial counsel for failing to object, appellant repeatedly raises a claim of prosecutorial misconduct throughout his argument, which is consistent with his amended motion (App.Br. 18, 27-28, 31-32, 35; PCR L.F. 496-501). It must be noted that appellant cannot receive relief solely on a freestanding claim of prosecutorial misconduct, as such a claim would not be cognizable under Rule 29.15, as it is a claim of trial error that could have been raised on direct appeal. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997), cert. denied 523 U.S. 1052 (1998); State v. Weaver, 912 S.W.2d 499, 517 (Mo. banc 1995), cert. denied 519 U.S. 856 (1996). "Issues about which defendant and his counsel knew and which could have been raised at trial and by direct appeal may not be raised by post-conviction motion." State v. Hunter, 840 S.W.2d 850, 860 (Mo. banc 1992), cert. denied 509 U.S. 926 (1993); see also State v. Redman, 916 S.W.2d 787, 793 (Mo. banc 1995)("Post-conviction motions cannot be used as a substitute for direct appeal or to obtain a second appellate review").[4] The record is clear that appellant and his counsel knew of his claim that he believed the prosecutor's argument was not consistent with Bulington's statement, as this is why he objected to it at

[4]While claims of prosecutor misconduct have been permitted in a post-conviction motion, these have been limited to cases where exculpatory evidence was withheld by the prosecutor, and thus was not known to appellant at the time of trial and direct appeal. See State v. Phillips, 940 S.W.2d 512, 516-17 (Mo. banc 1997); Hayes v. State, 711 S.W.2d 876, 880 (Mo. banc 1986).

trial (PCR Tr. 528-532). Thus, appellant would only have been entitled to relief if he established ineffective assistance of counsel.

C. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

D. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

1. Appellant Failed to Prove the Knowing Use of False and Misleading Evidence or

Argument

The State may not knowingly use false evidence to obtain a conviction, including allowing unsolicited false evidence to go uncorrected. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Naupe v Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). However, in this case, there is no question that neither the evidence nor the argument by the prosecutor was false. Everything Mrs. Bulington testified to was consistent with Tracie Bulington's statements—appellant was left at Mrs. Bulington's house alone while Bulington accompanied her mother to town, and the gun was taken without her knowledge (Mov.Exh. 9 p. 49; Mov.Exh. 13 p. 9; Tr. 698-700). Everything the prosecutor said was also consistent with Bulington's statements and the evidence—Mrs. Bulington's testimony established that the gun was taken by stealth, as it indeed was (Mov.Exh. 9 p. 49; Mov.Exh. 13 p. 9; Tr. 698-700, 940). The motion court's findings to this effect was not "parsing" the prosecutor's language, but merely stated the obvious—appellant failed to establish that either the testimony or the argument were untrue (PCR L.F. 466). Because an objection to this allegedly "false" testimony or argument would therefore been meritless, trial counsel could not have been ineffective for failing to make a "false and misleading" objection, as counsel is not ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.2d 726, 741 (Mo. banc 2003).

Further, appellant's argument completely disregards the motion court's findings as to the true meaning of the prosecutor's argument. The motion court found that the

argument that the taking of the gun by stealth showed that appellant deliberated referred not to a claim that appellant took the gun, but that the taking of the gun was part of the planning of the murders by appellant, Vance and Bulington, that appellant was therefore complicit in the theft of the gun, and that the plan evidenced deliberation (PCR L.F. 466). This finding is consistent with the remainder of the arguments by both prosecutors, which repeatedly referred to the escape plan as evidence of deliberation for the murders, including the search for a gun to use (Tr. 915, 917-919, 941, 943). A claim of prosecutorial misconduct from knowingly presenting false evidence is not a "pure issue of law," but requires factual findings. White v. State, 57 S.W.3d 341, 342-44 (Mo.App., E.D. 2001). This Court will defer to the lower court's factual findings. See State v. Self, 155 S.W.3d 756, 759 n. 3 (Mo. banc 2005), *quoting* Obermeyer v. Bank of America, 140 S.W.3d 18, 22 (Mo. banc 2004). Thus, appellant failed to prove that prosecutor's argument was that appellant personally stole the gun and was therefore false.

Additionally, the finding that the argument referred to the overall plan shows appellant failed to prove that the prosecutor was not knowingly presenting false evidence or a false argument. To merit relief on a due process violation based on prosecutorial misconduct, the defendant had to show that the prosecutor acted knowingly. Giglio, 405 U.S. at 153; Naupe, 360 U.S. at 269. Because the motion court found that the argument was not directed towards who actually stole the gun, but towards the stealing of the gun as part of the plan, appellant failed to show that the prosecutor knowingly argued that appellant stole the gun. That the prosecutor's intent was not to suggest that appellant

alone stole the gun is further supported by his original question to Mrs. Bulington, asking if appellant ***and*** Bulington were left alone at the house (Tr. 699). Thus, the motion court's finding of the true meaning of the prosecutor's argument must defeat appellant's claim. Because appellant failed to prove prosecutorial misconduct, there was no basis to object, and counsel will not be deemed ineffective for failing to make a meritless objection. Middleton, 103 S.W.2d at 741. Thus, counsel was not ineffective for failing to properly object to the evidence or argument.

2. "Failure to Preserve" is Not Cognizable

Allegations that counsel failed to preserve a claim for appeal are not cognizable in a Rule 29.15 motion. Fears v. State, 991 S.W.2d 190, 190 (Mo.App., E.D. 1999); State v. Link, 965 S.W.2d 906, 912 (Mo.App., S.D. 1998); State v. Thompson, 955 S.W.2d 828, 831 (Mo.App., W.D. 1997). Claims of ineffective assistance of trial counsel necessarily turn upon whether appellant received a fair *trial*, i.e. whether there is a reasonable probability that the outcome of trial would have been different. State v. Loazia, 829 S.W.2d 558, 569-570 (Mo.App. E.D. 1992)(citing Strickland, 466 U.S. at 687); see also State v. Johnston, 957 S.W.2d 734, 742 (Mo. banc 1997)(counsel is ineffective for "failing to preserve" a claim if there is a reasonable probability that the outcome of ***guilt or penalty phase*** would have been different).

A logical analysis of the reason underlying this rule that such a claim is not cognizable makes the rule apparent. The determination of prosecutorial misconduct is within the discretion of the trial court. See State v. Roberts, 838 S.W.2d 126, 131

(Mo.App., E.D. 1992). Thus, it must be presumed that the trial court would have properly exercised its discretion and either sustained or overruled an objection based on prosecutorial misconduct. Strickland, 466 U.S. at 694-95. If the trial court had properly sustained the objection, then there would have been no claim to raise on appeal. If the trial court had properly overruled the objection, appellant would not have been entitled to relief on appeal. Under Strickland, the option appellant apparently envisions—that the motion court would have abused its discretion—cannot be considered, as appellant cannot overcome the presumption that the trial court would have ruled properly. Id. Appellant's claim must rest on the merits of the objection if made at trial, and not the speculation that the trial court would have erred if given the opportunity. Therefore, the "failure to preserve" cannot logically apply to a claim of ineffective assistance of trial counsel for failing to object.

The cases that appellant claims render a claim of failure to preserve cognizable simply do not do so. In State v. Debler, 856 S.W.2d 641 (Mo. banc 1993), this Court did not rule that such claims were cognizable, but simply recognized that the movant had made such a claim, and ruled that, unless an argument is clearly improper, failing to object is not ineffective. Id. at 652. Under the presumption of Strickland, if an argument was improper, the trial court would sustain an objection to it. Strickland, 466 U.S. at 694-95. Appellant also cites State v. Storey, 901 S.W.2d 886, 900 (Mo. banc 1995), for support of his contention, but respondent cannot find anything on the page cited suggesting that failure to preserve error for appeal is cognizable on post conviction relief

(App.Br. 32). Thus, Debler and Storey do not provide appellant the uncognizable and illogical claim of failure to preserve, and the motion court therefore did not clearly err in denying that claim.

E. Appellate Counsel was Not Ineffective

Finally, appellant raises an alternative claim that, if this Court believes that trial counsel had properly preserved this issue for appeal, then appellate counsel was ineffective for failing to raise it on direct appeal (App.Br. 33-34). To prevail on a claim of ineffective assistance of appellate counsel, appellant must show that the actions of his attorney were outside the wide range of professionally competent assistance, that counsel's errors were so severe that counsel could not be said to be functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and that the deficient performance resulted in prejudice. Franklin v. State, 24 S.W.3d 686, 691 (Mo. banc), cert. denied 531 U.S. 951 (2000). Strong grounds must exist which show that counsel failed to assert a claim of error which would have required reversal had it been asserted on appeal and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). "'The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; i.e., the error that was not raised on appeal was so substantial as to amount to a manifest injustice or miscarriage of justice.'" Moss v. State, 10 S.W.3d 508, 514-515 (Mo. banc 2000)(quoting Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994)).

Appellant was not entitled to relief on his claim of ineffective assistance of counsel. First, appellate counsel is not ineffective for failing to raise unpreserved allegations of error. Honeycutt v. State, 54 S.W.3d 633, 650 (Mo.App., W.D. 2001); Ham v. State, 7

S.W.3d 433, 442 (Mo.App., W.D. 1999). Here, appellant's claim of prosecutorial misconduct was not preserved; appellant's only objection was that the argument "misstated the evidence," which, as previously shown, is not true (Tr. 940). Second, as previously shown, appellant failed to prove that either the evidence or argument was false and misleading, or that, if they were, that the prosecutor knew they were false and misleading. Thus, appellant has failed to show that his claim would have required reversal on appeal. Therefore, his claim that appellate counsel was ineffective for failing to raise this claim was meritless.

For the foregoing reasons, appellant's first point on appeal must fail.

II.

The motion court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to investigate and call a handwriting expert to authenticate a letter written by appellant's accomplice Roy Vance because appellant failed to prove that he was entitled to relief by a preponderance of the evidence in that he failed to prove how he would have been able to obtain known handwriting exemplars from Vance, and he failed to prove prejudice, as the letter did not refer to appellant's state of mind about the escape plan or show that he was under the control of Vance and Bulington, and there was not a reasonable probability that the letter would have overcome the substantial evidence of appellant's deliberation.

Appellant claims that trial counsel was ineffective for failing to investigate and call a handwriting expert to testify that appellant's accomplice, Roy Vance, had written a letter providing details of the plan to break Vance out of jail (App.Br. 36). Appellant argues that counsel's failure to hire such an expert prevented him from authenticating the letter at trial, prompting the trial court to rule it inadmissible (App.Br. 39-41). Appellant contends that the failure to introduce the letter had "devastating consequences" because the letter would have purportedly shown 1) that Vance's, "and by extension" appellant's, plan did not include the taking of any lives, and 2) that the plan was Vance's and Tracie Bulington's, not appellant's, and therefore that appellant was just a "dupe" and "follower" of Vance and Bulington (App.Br. 41-43).

A. Facts

At trial, during the cross-examination of State's witness Mike Platte, a sergeant with Missouri State Highway Patrol who investigated the murders, appellant attempted to introduce Defendant's Exhibit 3, a letter allegedly written by Vance to "Karl",[5] which was found in Bulington's car (Tr. 646, 866, 869-870; Mov.Exh. 83 p. 12-14). That letter reads as follows:

> Karl,
>
> I know what Tracie is talking to you about sounds crazy but if done right could be really simple with at least an hour or two to get away. There's no button for help and the camera doesn't record anything so they wouldn't even have a clue who did it. Under normal circumstances we're family me, you, and Tracie and need to be together as one. There isn't any of them that work here with enough heart to play hero as long as it's done right. I hate to even ask but it isn't anything that I wouldn't do for you and Carl with your situation

[5]Presumably Karl Bartholomew, identified by Bulington as a friend of Vance and Bulington (Mov.Exh. 9 p.7-8, Mov.Exh. 13 p. 3-4).

with Betty they wouldn't give you any warning. You'd just be arrested and never see daylight again. Why let that happen when we could all be together. Think about it and if you decide to Tracie will explain the lay out.

Love Ya My Brother,

Roy

P.S. Keep your head up and your heart strong.

(Mov.Exh. 83 p. 12, 14). The State objected that the letter was hearsay, to which appellant responded that it was admissible a statement of a co-conspirator (Tr. 870-873). The court sustained the objection, not because of hearsay, but because there was no foundation that Vance actually wrote the letter (Tr. 873-874).

In his amended motion, appellant claimed that counsel was ineffective for failing to investigate and call a handwriting expert, such as the Missouri State Highway Patrol's Robin Russell, to identify Vance as the author of the letter (PCR L.F. 201). He alleged that Russell examined the letter after appellant's trial and testified at Vance's trial that the letter was written by Vance (PCR L.F. 201). He alleged that he was prejudiced because the letter supported his defense that there was no plan to kill the guards and that appellant had not deliberated (PCR L.F. 201).

At the evidentiary hearing, appellant submitted Movant's Exhibit 65, a stipulation "regarding Robin Russell," in which the parties stipulated that on or about December 12, 2001, more than four months after the conclusion of appellant's trial and two months after

final sentencing, Russell examined the letter, comparing it with "known exemplars of Roy Dale Vance" and concluded that Vance had written the letter (PCR Tr. 55; Mov.Exh. 83 p. 2). The parties also stipulated that Russell had testified to this information at Vance's trial (Mov.Exh. 83 p. 3).

Counsel Estes testified at the evidentiary hearing that the defense had not contacted any handwriting experts, but did not know why doing so had not been considered (Tr. 609-610). Estes testified that, had an expert been able to identify Vance's handwriting, he would have wanted to present that testimony at trial (PCR Tr. 610).

The motion court denied this claim, finding that the letter would not have established that appellant did not deliberate in killing the deputies or that appellant was under the control of Vance and Bulington, and that, based on the strength of the evidence of deliberation, there was no reasonable probability that the letter would have affected the outcome of the trial (PCR L.F. 533-534).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct.

Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Appellant Failed to Establish Ineffective Assistance of Counsel

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i). When a movant claims ineffective assistance of counsel for failing to locate and call expert witnesses, the movant must show that such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the testimony of these witnesses would have benefitted movant's defense. State v. Davis, 814 S.W.2d 593, 603-04 (Mo. banc 1991), cert. denied 502 U.S. 1047 (1992).

Here, appellant's claim must fail because, while Ms. Russell or a comparable other handwriting expert may have existed at the time of trial, the basis of her testimony that Vance wrote the letter did not exist at the time of trial, and appellant failed to establish that such a conclusion could have been made prior to appellant's trial. Ms. Russell conducted

the examination by comparing the letter to "known exemplars" of Vance's handwriting (Mov.Exh. 83 p. 2). Appellant failed to allege in his motion or present any evidence as to what these known handwriting exemplars were. Such known exemplars could have only been obtained in one of two ways: 1) the State found something that Vance had written, or 2) the State requested that Vance provide a handwriting sample under Rule 25.06(B)(6), which permits the State to obtain such a sample upon a motion for it. Supreme Court Rule 25.06(B)(6). Either way, appellant failed to allege or present evidence that those exemplars could have been obtained by counsel prior to appellant's trial—the stipulation regarding Ms. Russell specifically stated that she did not conduct the handwriting examination until after the appellant had been tried and sentenced (Mov.Exh. 83 p. 2). Appellant would not have had the force of Rule 25.06(B)(6) to compel any such exemplars, the trial court had no power to order Vance to submit such writing exemplars without the State's request as a defendant has no power to collect evidence from a third party against his will, and appellant failed to establish that Vance would have voluntarily provided such exemplars. See, e.g., State v. Robinson, 835 S.W.2d 303, 307 (Mo. banc 1992)(trial courts have no authority to compel witness psychiatric examinations); Snowdell v. State, 90 S.W.3d 512, 515 (Mo.App., E.D. 2002)(courts have no authority to make a third party submit to physical examinations). Therefore, appellant failed to prove that he would have been able to have a handwriting analysis of Vance done prior to trial. Without proof of this vital fact, appellant failed to prove counsel was ineffective, as it would have been meaningless for counsel to seek a handwriting analysis without a known

sample of Vance's handwriting. Counsel is not ineffective for failing to undertake a meaningless act. State v. Goff, 70 S.W.3d 607, 612 (Mo.App., S.D. 2002)(J. Parrish, concurring), *citing* White v. State, 939 S.W.2d 887, 898 (Mo. banc), cert. denied, 522 U.S. 948 (1997).

D. Appellant was Not Prejudiced

Further, appellant was not prejudiced by counsel's failure to admit the letter into evidence. The letter does not do that which appellant claims: it does not show that appellant did not deliberate in the murder of the two deputies, nor does it show that appellant was under the control of Vance and Bulington (App.Br. 41-42). First, Vance's comments regarding no one "with enough heart to play hero," if true (which, without any evidence to show that to be so, cannot be assumed), only shows, at most, that Vance may not have believed anyone would need to killed during the escape, not that he was unwilling to do so if necessary. Regardless, as the letter was not written to appellant or by appellant, it has nothing to do with appellant's state of mind as to whether or not he planned to kill anyone (Mov.Exh. 83 p. 12). Second, the fact that Vance had Tracie talking to Karl did not mean she and Vance were doing all the planning and appellant was just on for the ride; Vance merely would have had Tracie, rather than appellant, talk to Karl ***first*** about the plan because Karl knew Tracie and not appellant (Mov.Exh. 13 p. 4-6). Appellant's evidence in the post-conviction proceeding showed that appellant also spoke to Karl about the plot (Mov.Exh. 13 p. 8). It also could have meant that the letter to Karl was written before appellant met Karl, as Karl was receiving letters from Vance prior

to appellant coming to the area on June 17 (Mov.Exh. 13 p. 4-7). Regardless, even the plainest reading of the letter is not exculpatory, as it confirmed that there was a plan that resulted in appellant killing the victims, which supported the finding of deliberation. Thus, appellant failed to prove by a preponderance of the evidence that the letter tended to prove those things he alleged it could prove.

Further, there was substantial other evidence that appellant deliberated in the murders. Appellant's planning of the crimes with attention to the inner workings of the jail, his visits to Vance prior to the escape attempt, his test-firing the gun prior to the murders, the extremely close range of the gunshots, the number of shots to Deputy Egley and the quality of the wounds to both victims, his failure to cease firing and provide aid after killing Deputy Acton and wounding Deputy Egley, and his disposal of the gun and jail keys, were all evidence of appellant's deliberation, as this Court found on direct appeal. State v. Tisius, 92 S.W.3d 751, 764 (Mo. banc 2002), cert. denied 539 U.S. 920 (2003). In light of the substantial evidence of deliberation, there was not a reasonable probability that the letter, which appellant failed to establish actually demonstrated his lack of deliberation, would have affected the jury's finding of deliberation. Thus, appellant failed to establish Strickland prejudice from the failure to authenticate the letter.

In light of the foregoing, appellant's second point on appeal must fail.

III.

The motion court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to object to references to and the admission of appellant's t-shirt, contained in State's Exhibit 52 along with other clothing appellant was wearing when arrested, which depicted the words "Guardians of Paradise," on the grounds that the shirt improperly suggested that appellant was a member of an anti-social group, because appellant failed to prove he was entitled to relief in that appellant presented absolutely no evidence as to the meaning of the title "Guardians of Paradise" or the artwork, that the shirt contained any reference to an anti-social group, or that the jury would have known any information about the logo on the shirt to have considered it in reaching its verdict.

Appellant claims that trial counsel was ineffective for failing to object to "references to and the admission of" appellant's t-shirt, which featured the words "Guardians of Paradise" (App.Br. 44). Appellant argues that the t-shirt, which he claims bore the image of a "snarling, taloned, winged beast" and "violent, demonic figures," may have led the jury to believe he "was part of or supported some anti-social group," and thus convicted him because "of the violence of the image that the t-shirt bore" (App.Br. 47, 50).

A. Facts

During the State's guilt phase evidence, David Hall, an investigator with the Missouri State Highway Patrol, testified that he and his partner, Mike Platte, went to

Kansas to pick up appellant (Tr. 706-707). He also retrieved physical evidence—specifically, the clothing appellant was wearing when he was arrested, including blue jeans, a Cleveland Indians baseball cap, a black leather belt, a baseball jersey, a Sonics basketball jersey with "40, Kemp," a sweatshirt, and a black t-shirt with the words "Guardians of Paradise" on the front and back (Tr. 708-709; St.Exh. 52). The t-shirt featured artwork including a winged tiger with talons on the wings, a yin-yang, Asian lettering, and some flames (St.Exh. 52). Those items were all packaged together and submitted to the Patrol's evidence officer for later laboratory testing (Tr. 707-711). The only objection to the introduction of the clothing was that they were seized in a warrantless seizure (Tr. 710). DNA testing on a blood stain found on the jeans revealed DNA consistent with Deputy Acton's DNA (Tr. 739-742).

In his amended motion, appellant alleged that counsel was ineffective for failing to object to the introduction of the t-shirt, claiming that the t-shirt was irrelevant and made the jury more likely to convict appellant based on an "improper and speculative consideration that he was a member of or endorsed an anti-social group" (PCR L.F. 183). He also alleged that it violated his constitutional rights to freedom of association and speech, as his endorsement of the alleged anti-social group was used as evidence of his guilt (PCR L.F. 183-184).

At the evidentiary hearing, counsel Estes testified that he did not object to display of the Guardian of Paradise T-shirt or the testimony that the shirt said "Guardians of Paradise" because he did not think it was objectionable, having "no idea what the

'Guardians of Paradise' is" and having never heard of it (PCR Tr. 593-594). No other evidence about the t-shirt was elicited.

The motion court denied appellant's claim, finding that appellant introduced no evidence as to the meaning of "Guardians of Paradise" or "how the jury would have possibly taken that to mean" he was in an anti-social group (PCR L.F. 528). The court also found that appellant failed to present evidence that the phrase was used as evidence of guilt, and thus there was no prejudice (PCR L.F. 528-529).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Appellant Failed to Establish Ineffective Assistance of Counsel

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable

probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Here, appellant's failed to prove his claim by a preponderance of the evidence. Instead, appellant believes he is entitled to relief based on the speculative assumption that the Guardians of Paradise stand for violence and demonic influence, as he claims the image alone "belies" the court's conclusion that the jury had no information to connect the Guardians of Paradise, and thus appellant, to an anti-social group (App.Br. 47). But allegations in a motion for post-conviction relief are not self-proving, and the movant must prove his allegations by a preponderance of the evidence. State v. Parker, 890 S.W.2d 312, 321 (Mo.App., S.D. 1995); State v. Lewis, 872 S.W.2d 653, 654 (Mo.App., E.D. 1994); State v. Boone, 869 S.W.2d 70, 78 (Mo.App., W.D. 1993). Specifically, appellant failed to present any evidence as to what "Guardians of Paradise" means or what it stands for.[6] Without this evidence, appellant failed to prove a reasonable probability that

[6]This assumes that appellant could have discovered evidence that the shirt referenced something negative, as appellant speculates that the jury must have attached an evil meaning to the shirt. There is no reason to actually believe that the jurors would have necessarily attached a negative connotation to the shirt, but it is equally possible that they would have seen it as a tribute to Far Eastern mythology, the handiwork of a

the jury convicted appellant of murdering two deputies because of artwork on his t-shirt.

As appellant states, State v. Driscoll, 55 S.W.3d 350 (Mo. banc 2001), is instructive in this case. In Driscoll, the prosecutor presented guilt-phase testimony that the defendant was a member of the Aryan Brotherhood, which one witnesses described as a "white organization of white men to help other white boys - - men - - young men. It's a prison gang is what it is. They kill and murder all the time - - it's a way of life[.]" Id. at 352-53. The witness also testified that Driscoll's tattoo of a six-shooter with words around it and the initials AB marked him as a member of the Aryan Brotherhood, and that Driscoll told him one has to kill a black man to join the group. Id. at 353. Another witness testified that Driscoll's chest had a tattoo of a revolver and clenched fists, with the German words for "white power" and the initials AB, which stands for Aryan Brotherhood. Id. This Court found that this evidence was not admissible in the guilt phase, as "mere evidence of the defendant's membership in a racist prison gang" violated the First Amendment and constituted improper propensity evidence. This Court stated that it:

> enabled the state to portray Driscoll as a person of bad character who advocated violent "white power" racism and who chose to associate with an inmate gang professing the belief and whose "way of life" was to "kill and murder all the

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creative mind, or simply just a shirt.

time."

Id. at 355. The evidence also had only "tenuous" logical relevance and "no legal relevance," thus rendering the evidence inadmissible. Id. at 354.

Unlike Driscoll, there was no evidence that the words "Guardians of Paradise" on the t-shirt represented any group at all, let alone an anti-social group; that "members" of the Guardians of Paradise, if such exist, are known to be violent or anti-social; or that members have any obligation to take part in violent or anti-social activities. Thus, the t-shirt in this case is a far cry from the comparatively voluminous evidence in Driscoll placing that defendant in a "racist prison gang" and connecting him to various bad acts. Further, the t-shirt was relevant in this case, as it was evidence seized from the appellant when he was arrested and was, like the jeans with one of the victim's blood, likely worn at the time of the crime (Tr. 707-711, 739-742). Therefore, appellant has failed to prove that the t-shirt associated appellant with any anti-social group or bad act, and thus failed to show that the jury could have possibly been influenced by the shirt.

For the foregoing reasons, appellant's third point on appeal must fail.

IV.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to object to Instructions #5, #8, #10, and #13, the verdict directors, on the grounds that they failed to "meaningfully distinguish" between first-degree murder and second-degree murder because counsel was not ineffective in that this Court has repeatedly rejected claims that the definition of "deliberation" contained in the pattern instruction for first-degree murder fails to adequately distinguish first-degree murder from second-degree murder, and counsel cannot be ineffective for failing to raise an objection in the face of that well-settled law. Further, appellant's claim of failure to preserve is not cognizable under Rule 29.15.

Appellant claims that trial counsel was ineffective for failing to properly object to the verdict directors for first- and second-degree murder because the instructions failed to "meaningfully distinguish" between the two degrees of murder (App.Br. 51). Appellant argues that the definition of "deliberation" misdirects the jury, blurs the distinction between the two degrees of murder, and prevents a consideration of whether the defendant acted with a "cool purpose" (App.Br. 54-64).

A. Facts

Prior to trial, appellant filed two motions to dismiss charges of murder in the first degree based on the alleged failure of the pattern instructions to properly define deliberation so that it adequately distinguishes first-degree murder from second-degree

murder (L.F. 101-111). However, at the instructions conference, appellant did not make an objection on this basis, objecting to the verdict directors for first-degree murder based only on insufficient evidence (Tr. 904-905).

The verdict directors for first-degree murder, patterned after MAI-CR 3d 313.02, were submitted to the jury, each containing the following paragraph:

> Third, that the defendant did so after deliberation,
>
> which means cool reflection upon the matter for any length of time no matter how brief,

(Supp.L.F. 5, 10). The verdict directors for conventional second-degree murder, patterned after MAI-CR 3d 313.04, and reading the same as the instructions for first-degree murder except omitting the above paragraph, were also submitted (Supp.L.F. 8, 13).

In his amended motion, appellant claimed trial counsel was ineffective for failing to renew objections to the verdict directors at the instructions conference, alleging that the instructions misled the jury and relieved the State of its burden to prove deliberation (PCR L.F. 194-195). Appellant acknowledged that this Court has rejected these claims, but that counsel should have preserved the issue for reexamination (PCR L.F. 196-197).

At the evidentiary hearing, counsel Estes testified that counsel Kenyon was responsible for making objections to instructions in both phases of trial (PCR Tr. 639). In her deposition, appellate counsel testified that she believed the definition was improper and she had made the argument before, and believed her point on insufficiency of the

evidence of deliberation on direct appeal covered the same material and was "the way to go" (Mov.Exh. 125 p. 19-22).

The motion court denied appellant's claim, finding that the claim had repeatedly denied by this Court and further finding that any failure to preserve the claim for appeal was not cognizable (PCR L.F. 532).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of

proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Counsel is not ineffective for failing to assert the theory of a change in the law in the face of settled authority. State v. Stillings, 882 S.W.2d 696, 703 (Mo.App., S.D. 1994). Trial counsel's performance is measured by referring to the law existing at the time of trial. State v. Brown, 902 S.W.2d 278, 298 (Mo. banc), cert. denied 516 U.S. 1031 (1995). At the time of trial, the law stating that the definition of "deliberation" aduquately distinguished first-degree murder from second-degree murder was well-settled, as this argument had been considered and rejected by this Court. State v. Middleton, 998 S.W.2d 520, 524 (Mo. banc 1999), cert. denied 528 U.S. 1167 (2000); State v. Rousan, 961 S.W.2d 831, 851-52 (Mo. banc), cert. denied, 524 U.S. 961 (1998). As this Court stated in Rousan:

> Contrary to appellant's assertions, the statutory language of chapter 565 and this Court's decisions clearly distinguish first from second degree murder. A person commits the crime of second degree murder if he "knowingly causes the death of another person." Section 565.021.1(1). A person commits the crime of first degree murder if "he knowingly causes the death of another person after deliberation upon the matter." Section 565.020.1. "Deliberation" is "cool reflection for any length of time no

> matter how brief." Section 565.002(3). The element of deliberation is the element that separates first degree and second-degree murder. . . . Only first degree murder requires "the unimpassioned premeditation that the law calls deliberation." . . . The statutory language of chapter 565 and this Court's decisions, therefore, plainly distinguish between second and first degree murder by requiring cool reflection for a conviction of murder in the first degree.

Rousan, S.W.2d 961 at 851-52. Additionally, this Court has since rejected a claim nearly identical to the claim that appellant alleges counsel should have raised, further suggesting any objection by counsel would have been futile. State v. Strong, 142 S.W.3d 702, 716-17 (Mo. banc 2004), cert. denied 125 S.Ct. 872 (2005). Therefore, trial counsel could not have been ineffective for failing to object to the verdict directors for first- and second-degree murder based on an allegedly insufficient definition of "deliberation."

For the foregoing reasons, appellant's fourth claim on appeal must fail.

V.

The motion court did not clearly err in denying appellant's claim that counsel failed to properly object to Instruction #4, the reasonable doubt instruction, because counsel was not ineffective in that this Court has repeatedly rejected such claims, and counsel cannot be ineffective for failing to raise an objection in the face of that well-settled law. Further, appellant's claim of failure to preserve is not cognizable under Rule 29.15.

Appellant claims that trial counsel was ineffective for failing to properly object to Instruction No. 4, the instruction defining reasonable doubt, as lowering the State's burden of proof (App.Br. 65). Appellant argues that, although "this Court has rejected similar claims," the claim of error had merit (App.Br. 69-71). Appellant claims counsel was also ineffective for failing to preserve the issue for appeal (App.Br. 68-69).

Prior to trial, appellant objected to MAI-CR 3d 302.04 (as well as MAI-CR 3d 300.02), the pattern instruction defining reasonable doubt, and also moved to modify the instruction (Tr. 42-44).[7] At the guilt-phase instruction conference, however, appellant did not object to Instruction #4, which was patterned after MAI-CR 3d 302.04 (Tr. 904-905).

[7]Appellant cites to Movant's Exhibits 77 and 78 to reference the motion (App.Br. 67). Exhibits 77 and 78 were not offered at the evidentiary hearing (PCR Tr. ix, xii).

The instruction read:

> The charge of any offense is not evidence, and it creates no inference that any offense was committed or that the defendant is guilty of an offense.
>
> The defendant is presumed to be innocent, unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.
>
> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

(Supp.L.F. 4).

The morning following the guilt phase verdicts, the court made a record in

chambers that, on Instruction #4, the jury had underlined the words "common sense" and bracketed the words of the second sentence of the final paragraph (Tr. 953). The court asked if anybody wanted to make an additional record, but both parties declined (Tr. 953).

In his amended motion, appellant alleged that trial counsel was ineffective for failing to "reassert" his objection to the reasonable doubt instruction at the instructions conference (PCR L.F. 198). Appellant alleged that, while such claims have been rejected, he was raising the claim for federal preservation and because the markings on the jury's copy of the instruction showed that the challenged words had a "decisive" effect on the jury (PCR L.F. 199).

At the evidentiary hearing, counsel Estes testified that counsel Kenyon was responsible for making objections to instructions in both phases of trial (PCR Tr. 639). Appellate counsel testified by deposition that the issue was not preserved for appeal and that she had not seen any recent law on the issue meriting raising the issue on appeal, although she had raised it before (Mov.Exh. 125 p. 23-27).

The motion court denied appellant's claim, finding that the claim had been rejected by this Court and further finding that any failure to preserve the claim for appeal was not cognizable (PCR L.F. 532-533).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson

v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

Counsel is not ineffective for failing to assert the theory of a change in the law in the face of settled authority. State v. Stillings, 882 S.W.2d 696, 703 (Mo.App., S.D. 1994). Trial counsel's performance is measured by referring to the law existing at the time of trial. State v. Brown, 902 S.W.2d 278, 298 (Mo. banc), cert. denied 516 U.S. 1031 (1995). Instruction #4 was directly patterned after MAI-CR 3d 302.04. MAI-CR 3d 302.04. At the time of trial (and well before trial as well as since), it was well settled that

the pattern instruction defining proof beyond a reasonable doubt as being "firmly convinced" accurately defined the concept, as this Court had consistently and repeatedly denied such claims. See State v. Middleton, 995 S.W.2d 443, 465-66 (Mo. banc), cert. denied 528 U.S. 1054 (1999); State v. Deck, 994 S.W.2d 527, 544 (Mo. banc), cert. denied 528 U.S. 1009 (1999); State v. Clay, 975 S.W.2d 121, 133 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). Further, this Court has also held that the failure of counsel to offer a non-MAI instruction on reasonable doubt is not ineffective, as "no reasonable counsel would have offered a non-MAI instruction on reasonable doubt." Clay, 975 S.W.2d at 133. Therefore, trial counsel could not have been ineffective for failing to object to the definition of reasonable doubt, patterned after the MAI instruction.

Further, the fact that the jury made markings on its copy of the reasonable doubt instruction around certain words is irrelevant. The instructions properly defined reasonable doubt. Deck, 994 S.W.2d at 544. For the jury to utilize the instructions to make sure that they are conscientiously following the law, far from being an indication of error, is precisely what is desired and expected of jurors. Therefore, the markings on the jury instruction did not create error where none existed, and counsel was not ineffective for failing to make an objection based on the markings.

Finally, appellant's claim that counsel was ineffective for failing to preserve this claim for appeal was not cognizable under Rule 29.15. Fears v. State, 991 S.W.2d 190, 190 (Mo.App., E.D. 1999); State v. Link, 965 S.W.2d 906, 912 (Mo.App., S.D. 1998);

State v. Thompson, 955 S.W.2d 828, 831 (Mo.App., W.D. 1997).[8] Thus, appellant was not entitled to relief on that claim.

For the foregoing reasons, appellant's fifth point on appeal must fail.

[8]This issue is discussed in more detail in section D under subheading 2, "'Failure to Preserve' is Not Cognizable," in Point I, supra.

VI.

The motion court did not clearly err in denying appellant's claim that appellate counsel was ineffective for failing to raise on direct appeal issues of the admission and projection on a large screen of ten autopsy photographs of the two victims because counsel was not ineffective in that reversal would not have been required if the claims had been raised as 1) the photographs were admissible to explain the nature, location, and extent of wounds, the cause of death, and the condition of the victim's bodies, to assist the jury in understanding the Dr. Dix's testimony, and to establish the elements of deliberation and intent, and 2) the projection of the photographs was permissible to attempt to help the jury view Dr. Dix's markings while explaining his conclusions. Further, the prejudicial impact of the projection of the photographs was not clear from the record, as the record shows the projected photographs were difficult to see.

Appellant claims that appellate counsel was ineffective for failing to raise the admission of autospy photographs of the two deputies and to the projection of the photographs on a "movie-screen" as a claim on direct appeal (App.Br. 73). Appellant argues that the photographs were not relevant because the injuries, cause of deaths, and *corpus delicti* were not at issue, appellant was willing to stipulate to that information, and the photographs had a prejudice "wholly disproportionate" to their logical relevance, diverting the jury's attention from their task (App.Br. 73, 79-81). Appellant claims that the prosecutor projected the pictures simply to prejudice the jury against him and encourage

the jury to decide the case "on raw emotion" (App.Br. 79-80).

A. Facts

At trial, during the testimony of its first witness, medical examiner Jay Dix, the State offered State's Exhibits 20-22, three autopsy photographs of Deputy Acton, including one photograph of an x-ray of his head, and State's Exhibit 24-30, seven autopsy photographs of Deputy Egley, including one photograph of an x-ray of his head (Tr. 580-588). Appellant objected to the photographs based on an earlier motion in limine, arguing that cause of death nor identity of the victim was at issue, that the defense was willing to stipulate to the cause of death, and that the gruesome nature of the autopsy photographs were far more prejudicial than probative (Tr. 580-581). That objection was overruled, and appellant was granted a continuing objection to all of the photographs (Tr. 581-582). Dr. Dix then used the photographs to explain the condition of the victims when he initially observed them and the location of the gunshot wounds to the two victims, including the x-ray photographs showing the location of the bullets (Tr. 582-583, 587-588).

After the photographs were admitted, the prosecutor received permission to show the pictures to the jury (Tr. 584). After that, counsel approached the bench to make a record that the prosecutor was blowing up photographs on a large screen "that appears to be like a movie screen which is much larger than the photographs" (Tr. 584). The judge noted this as an objection and overruled it (Tr. 584). Dr. Dix then used the photographs on the overhead projector for at least some of the pictures to mark different

parts of the pictures to explain his procedures as well as the location of the wounds and blood (Tr. 584-586, 588-591). During this presentation, the prosecutor noted that the projector was "not going to work very well," as the projected photographs were "hard to see" (Tr. 586). After Dr. Dix finished testifying to the contents of the pictures, the prosecutor received permission to pass the exhibits to the jury since they were "having difficulty with the projector" (Tr. 591).

In his amended motion, appellant alternatively claimed that either trial counsel was ineffective for failing to preserve or appellate counsel was ineffective for failing to raise the issue on direct appeal of the photographs being displayed on a "large movie-type screen," alleging that the enlargement magnified the gruesome, inflammatory, and prejudicial effect of the photographs and made it more likely the jury would convict of murder in the first degree (PCR L.F. 180-181). He also alleged that appellate counsel was ineffective for failing to raise the admission of the photographs on direct appeal (App.Br. 181).

At the evidentiary hearing, trial counsel Estes testified that he objected to the admission of photographs of the deputies' autopsies, but did not make a specific objection to the photographs being shown on a large screen (PCR Tr. 593). However, the record shows that when counsel made a record that the photographs were being blown up, the trial court noted that counsel's objection "was noted," and counsel did not further object, even though he had approached to make a specific objection (PCR Tr. 593).

Appellate counsel testified at the hearing that she had seen the objection to the "movie screen" photographs, but that it did not seem prejudicial on the record that was made at trial, believing the pictures were likely projected to make them easier to see more detail (PCR Tr. 497). She testified that she thought the admission of the photographs was "technically" a good point, because there was no issue about the cause of death, but noted that the State does not have to stipulate to facts and is required to prove the death of the victims (PCR Tr. 497-498). Therefore, while she had "started to rethink gruesome photos" and believed "maybe we should all be paying more attention to them," she did not think a point about the admission of photographs "had much chance on appeal" (PCR Tr. 498). Additionally, in her deposition, she testified that it was not her practice to raise every possible claim on appeal and that she raises claims with the most merit or potential success, although she would raise claims that have been denied, for example, "in an area that is evolving so fast and it's so current" (Mov.Exh. 125 p. 52, 55).

The motion court denied appellant's claims, finding that appellate counsel had a reasonable strategic reason not to raise a photograph claim, as she decided not to raise the claims regarding photographs because the display of the photographs did not appear prejudicial based on the record, the claim did not appear to have merit, and the State had a duty to prove its case (PCR L.F. 527). The court agreed with counsel that the claim would not have had merit on appeal, as the photographs would have been admissible (PCR L.F. 527-528).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Appellate Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of appellate counsel, appellant must show that the actions of his attorney were outside the wide range of professionally competent assistance, that counsel's errors were so severe that counsel could not be said to be functioning as the "counsel" guaranteed the defendant by the Sixth

Amendment, and that the deficient performance resulted in prejudice. Franklin v. State, 24 S.W.3d 686, 691 (Mo. banc), cert. denied 531 U.S. 951 (2000). Strong grounds must exist which show that counsel failed to assert a claim of error which would have required reversal had it been asserted on appeal and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). "'The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; i.e., the error that was not raised on appeal was so substantial as to amount to a manifest injustice or miscarriage of justice.'" Moss v. State, 10 S.W.3d 508, 514-515 (Mo. banc 2000)(quoting Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994)).

"Photographs are relevant if they show the scene of the crime, the identity of the victim, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony." State v. Rousan, 961 S.W.2d 831, 844 (Mo.banc), cert. denied 524 U.S. 961 (1998). If a photograph is relevant, it should not be excluded simply because it may be inflammatory. Id. "Insofar as photographs tend to be shocking or gruesome, it is almost always because the crime is shocking or gruesome." Id. Gruesome crimes produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions. State v. Feltrop, 803 S.W.2d 1,11 (Mo. banc), cert. denied 501 U.S. 1262 (1991). Further, a photograph is not rendered inadmissible simply because other evidence described what is shown. Id. "The State cannot be unduly

limited as to the matter of satisfying its quantum of proof." State v. Sandles, 740 S.W.2d 169, 177 (Mo.banc 1987), cert. denied 485 U.S. 994 (1988). Nor does the offer to stipulate to facts shown in the photographs render the photographs inadmissible. State v. Schneider, 736 S.W.2d 392, 403 (Mo. banc 1987), cert. denied, 484 U.S. 1047 (1988).

In this case, it is clear that appellate counsel was not ineffective. The ten autopsy photographs of the victims, two of which were photographs of x-rays, were admissible, as they showed the nature, location, and extent of the wounds, the cause of death, and the condition of the deputies' bodies (Tr. 580-591). The photographs helped Dr. Dix explain the autopsies so that the jury could better understand his testimony. Further, the photographs showed the location of the bullet wounds (one to Deputy Acton's head, four to Deputy Egley's head, and one to Deputy Egley's shoulder), all but one hitting the victims in the head, which helped establish the elements of deliberation and intent. See State v. Ervin, 979 S.W.2d 149,159 (Mo.banc 1998), cert. denied 525 U.S. 1169 (1999)(multiple wounds to the victims support an inference of deliberation); State v. Craig, 33 S.W.3d 597, 600 (Mo.App., E.D. 2000)(killing by the use of a deadly weapon to a vital part of the victim's body is sufficient to permit a finding of intent to kill). Because the photographs were admissible, a claim of error as to the admission of photographs would not have required reversal if raised on direct appeal, and therefore appellate counsel was not ineffective for failing to raise that claim.

Nor was appellate counsel ineffective for failing to raise a claim as to the projection of the photographs. Projection of previously admitted photographs is permissible where

the enlarged photographs "serve[] legitimate purposes[.]" See State v. Wolfe, 13 S.W.3d 248, 263-64 (Mo.banc), cert. denied 531 U.S. 845 (2000)(photographs enlarged for penalty phase argument to establish depravity of mind aggravating circumstance). Here, the photographs were enlarged to assist the jury in seeing the photographs as Dr. Dix marked them while he testified (Tr. 584-586, 588-591). Thus, any claim raised on appeal would have failed. Further, the record does not appear to show appellant suffered such prejudice as to outweigh the probative impact of the photographs, as the jury had trouble viewing the enlarged photographs (Tr. 586, 591). Therefore, the showing of prejudice is not apparent from the record, further supporting the motion court's finding that appellate counsel was not ineffective.

For the foregoing reasons, appellant's sixth point on appeal must fail.

VII.

Appellant's claims of ineffective assistance of counsel for failing to object or act during voir dire were meritless as any such failures did not create a reasonable likelihood of a different result at trial had counsel so objected or acted.

Further, the motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to object to numerous alleged improper arguments because counsel was not ineffective in that each of the arguments was a proper comment on the evidence or defense arguments, and counsel is not ineffective for failing to make meritless objections.

In his final point, appellant makes numerous claims that the motion court clearly erred in failing to find that the prosecutors committed misconduct by making improper voir dire statements and closing arguments, and that trial counsel was ineffective for failing to properly object to the arguments (App.Br. 83-96).

A. Independent "Prosecutorial Misconduct" Claim is Not Cognizable

Appellant raises claims of prosecutorial misconduct in his point relied on and throughout his argument (App.Br. 18, 27-28, 31-32, 35). Appellant cannot receive relief solely on a freestanding claim of prosecutorial misconduct because such a claim would not be cognizable under Rule 29.15, as it is a claim of trial error that could have been raised on direct appeal. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997), cert. denied 523 U.S. 1052 (1998); State v. Weaver, 912 S.W.2d 499, 517 (Mo. banc 1995), cert. denied 519 U.S. 856 (1996). "Issues about which defendant and his counsel knew

and which could have been raised at trial and by direct appeal may not be raised by post-conviction motion." State v. Hunter, 840 S.W.2d 850, 860 (Mo. banc 1992), cert. denied 509 U.S. 926 (1993); see also State v. Redman, 916 S.W.2d 787, 793 (Mo. banc 1995)("Post-conviction motions cannot be used as a substitute for direct appeal or to obtain a second appellate review").[9] None of the claims appellant raises in this point would have been unknown or undiscoverable at the time of trial (PCR Tr. 496-525; App.Br. 83-84). Therefore, appellant cannot raise claims of prosecutorial misconduct, and appellant can only receive relief if counsel was ineffective for failing to object to the challenged statements.

B. Standard of Review

[9]While claims of prosecutor misconduct have been permitted in a post-conviction motion, these have been limited to cases where exculpatory evidence was withheld by the prosecutor, and thus was not known to appellant at the time of trial and direct appeal. See State v. Phillips, 940 S.W.2d 512, 516-17 (Mo. banc 1997); Hayes v. State, 711 S.W.2d 876, 880 (Mo. banc 1986).

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Trial Counsel was Not Ineffective

To prove ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483 A movant has the burden of proving grounds for relief by a preponderance of the evidence. Nicklasson, 105 S.W.3d at 484; Supreme Court Rule 29.15(i).

1. Voir Dire Claims

a. Reason for Attorney General's Office Assistance

During voir dire, prosecutor Ahsens told the panel that the prosecutor of a county can request assistance in a case, and that prosecutor Fusselman, the elected

prosecuting attorney of Randolph County had requested such assistance (Tr. 187). He then said, "Randolph County has not had the misfortune of having that many murders so it is not something with which he comes into contact with regularly. And that is why he asked for assistance and that is why I'm here. That's it." (Tr. 187). There was no objection to this statement (Tr. 187).

In his amended motion, appellant claimed that the statement about Randolph County not having many murders referenced matters outside the record, suggested appellant's case was among the worst in the county, and suggested that the prosecutor had special knowledge to determine that the case warranted the death penalty (PCR L.F. 154). Counsel Estes testified at the evidentiary hearing that he did not object to the prosecutor's statement about the rarity of murder cases in Randolph County because he did not think it was objectionable (PCR Tr. 628). Counsel Kenyon testified that it did not occur to him to object, but that he did believe it was objectionable because it presented facts not in evidence (PCR Tr. 812-813). The motion court denied the claim, finding that appellant was not prejudiced by the comment, as the comment would have had no effect on the verdict (PCR L.F. 519-520).

On appeal, appellant argues that this statement argued facts outside the record and "amounted to unsworn testimony by the prosecutor . . . that, by comparison to other cases, this one was special and more deserving of the Attorney General's assistance" (App.Br. 87). Appellant overstates the prosecutor's statement. Prosecutor Ahsens' statement suggested no qualitative reason that he was assisting the elected prosecutor

because the Attorney General only becomes involved in the worst crimes; in fact, his statement in context shows that the Attorney General's Office will be appointed in any case where the prosecutor asks for assistance, not just the "worst" cases (Tr. 187). Further, it most likely would not have been a great shock to anyone on the venire panel from a county as large as St. Charles County that a smaller county like Randolph County with a county seat in Huntsville would not have a large amount of murders, nor would it be odd for the jurors, in their everyday experience, to believe that murder was a serious crime. This statement is unlike the comment in State v. Storey, 901 S.W.2d 886 (Mo. banc 1995), which appellant relies on for relief, that the murder was "the most brutal slaying in the history of this county [(St. Charles County)]." Id. at 900-01. Because the prosecutor's statement was not inflammatory and did not suggest special knowledge or status, there was no prejudice. Therefore, appellant failed to establish that these comments could have created a reasonable probability of adversely impacting the verdict.

b. Failure to Question Panel: Murder 1st Versus Murder 2nd

In his amended motion, appellant claimed that counsel was ineffective for failing to ask the panel whether they could consider the difference between the required mental states for first- and second-degree murder, and that this failure prevented him from discovering if jurors were biased against the lesser offense, which would have permitted a more intelligent exercise of peremptory strikes (PCR L.F. 172-173). Counsel Estes testified that he did not know why he did not ask questions during voir dire to ensure that

jurors could consider the different mental states for first- and second-degree murder (PCR Tr. 634-635). The motion court denied this claim, finding that counsel conducted a thorough voir dire and that there was no indication that the jury could not follow the instructions (PCR L.F. 525).

Appellant claims on appeal that counsel was ineffective for failing to inquire about the difference between first- and second-degree murder, which prevented counsel from knowing if the venire "could fairly and impartially consider second degree murder when law enforcement officers were killed" (App.Br. 87-89).[10] However, appellant failed to show that the failure to ask such a question had any impact on the verdict. The jury instructions explained the difference between first- and second-degree murder: deliberation (Supp.L.F. 5, 8, 10, 13). Jurors are presumed to follow the court's instructions. State v. Gilbert, 103 S.W.3d 743, 751 (Mo. banc 2003). Appellant failed to overcome this presumption; in fact, as appellant points out in other arguments on appeal, the jury deliberated for over six hours seemingly on the issue of deliberation alone (Tr. 948; App.Br. 32, 49-50, 63, 81). Therefore, it did not appear that the jury had any trouble accepting the difference between the two offenses, and thus, appellant failed to

[10]This claim seems out of place in this point, as every other allegation of error deals with improper statements by the prosecutors (App.Br. 85-86). As this claim is unrelated to the other claims, it appears that this point raises multifarious claims. See State v. Thompson, 985 S.W.2d 779, 784 n.1 (Mo. banc 1999).

prove a reasonable probability of a different result had he asked the question regarding the difference between the two degrees of murder.

2. "Acquittal First" Argument

In the opening portion of the guilt-phase closing argument, prosecutor Fusselman was explaining the verdict directors as to the murder of Deputy Acton (Tr. 913). He stated that Instruction #10 was the instruction for first-degree murder, then said,

> The other two instructions are what we call alternative or lesser-included counts which means only if after looking at Instruction Number 10 if you decide that this defendant over here did not deliberate during the ten minutes or so that he was exchanging pleasantries with Mr. Action before he took the gun he brought into that jail and pointed it at his forehead three feet, two or three feet away as he says, if you believe that he did not coolly reflect upon that matter for any length of time no matter how brief before he pulled that gun and shot him, then you will go to these other two instructions that we have that talk about alternative counts.

(Tr. 913). In rebuttal argument, prosecutor Ahsens said:

> Murder in the second degree. Did the defendant commit murder in the second degree? Yes. Because murder in the second degree is a lesser-included offense.

> What does that mean? That means if you commit murder in the first-degree, murder in the second degree has also been committed. You have to in order to commit murder in the first degree have done one something more. And that was deliberation. That's the only difference between murder in the second degree of one submission than the other, murder in the second. But keep in mind if you find that he did the three elements he shot these two men, he knew that he was doing was likely to kill. And he did it after deliberation, you don't even consider the rest of it. You look at murder second if and only if you do not believe that we proved those things beyond a reasonable doubt. But we did.

(Tr. 939-940). There was no objection to any of these arguments (Tr. 913, 939-940).

In his amended motion, appellant claimed that this argument was impermissible because it said the jurors could only convict of second-degree murder if they first found him not guilty of murder in the first degree, as jurors are required to consider lesser-included offenses (PCR L.F. 125-126). He alleged that the arguments misinstructed, misled, and confused the jury, and made it more likely that jurors would fail to consider second-degree murder, as the finding of murder first "automatically" included a finding of murder second (PCR L.F. 126). Counsel Estes testified that he did not object to any of this argument because he believed the argument was proper as it was "literally" a quote

from the instructions (PCR Tr. 616-617). The motion court denied the claim, finding the arguments were proper statements of law and that the strength of the evidence of deliberation precluded a finding of prejudice (PCR L.F. 498).

Appellant claims that the arguments were improper because the arguments "told the jurors that they could consider second degree murder only if they first acquitted" him of first degree murder (PCR L.F. 91). Such an "acquittal first" argument can be improper, as Missouri's pattern instructions for lesser-included offenses are not "acquittal first" instructions—they do not require an acquittal of the greater offense before considering the lesser offense. State v. Parker, 886 S.W.2d 908, 923-24 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995); State v. Wise, 879 S.W.2d 494, 517 (Mo. banc 1994), cert. denied 513 U.S. 1093 (1995). However, these arguments were not "acquittal first" arguments—neither prosecutor said that the jury had to find appellant not guilty of first-degree murder before considering second-degree murder, they said that the jury had to not find him guilty of first-degree murder before considering it (Tr. 913, 939-940). This is not parsing words, but expresses the vital difference between improper "acquittal first" instructions (and arguments) and proper non-coercive instructions (and arguments): the jury might not be able to agree that appellant should be found guilty or not guilty of the greater offense, i.e. be deadlocked, and still consider the lesser offense. Parker, 886 S.W.2d at 923. Thus, the argument properly stated the law. Further, the jury was properly instructed with an instruction tracking MAI-CR 3d 313.04, which shows any improper argument was not prejudicial. Id. at 924.

The same is true of the argument that second-degree murder is included in a finding of murder in the first degree. First-degree murder contains all of the elements of conventional second-degree murder, and thus second-degree murder is an included offense of first-degree murder. §§ 556.046.1(1), 565.020.1, 565.021.1(1), RSMo 2000. Therefore, the prosecutor's argument properly stated the law.

Because all of the alleged "acquittal first" arguments were proper statements of law, any objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.2d 726, 741 (Mo. banc 2003).

3. Argument About "Getting" Deputy Willie White

During the guilt phase, Deputy Wilburt White was on duty the morning of the murders when he returned to the Randolph County Jail around 12:45 a.m. following a call (Tr. 596-598). White heard a "slam-like noise" and looked in the door to see appellant holding a gun down over the dispatch counter, but could not see any of the dispatchers (Tr. 604-606). He œould clearly see appellant, but could only see the left side of Bulington (Tr. 604-605). White heard four popping noises, then saw appellant turn to Bulington and say, "Get him. Get him. Get him. Get him." (Tr. 606). He did not know what appellant meant, but he drew his gun and pointed it at appellant, then decided to back off the porch and call for help (Tr. 606-607).

Prosecutor Fusselman made the following argument:

> So [appellant] goes back to the front. He shot Mr. Egley several more times and as you heard somebody heard

> a female saying "What did you do that for?" He gave her the directions for Willie White who's outside at that point watching, saying "Get him. Get him. Get him."

(Tr. 919).

In the penalty phase, Bulington testified that, after appellant fired the first shot at Deputy Acton, Deputy Egley jumped up and started to run around the dispatch counter, at which point appellant said "something to the effect of 'Get him'" (Tr. 1036-1037). Deputy Egley saw Bulington, then turned back around, at which time appellant fired two or three shots at Egley (Tr. 1037). As Bulington was trying to get jail cells open, Egley grabbed Bulington, and appellant shot him again (Tr. 1038-1039). She then asked appellant why he did that, then she went for the front door (Tr. 1039). This was consistent with her pretrial statement, pretrial deposition testimony, and post-conviction deposition testimony, where she said appellant told her, "Get him" once prior to appellant shooting Deputy Egley (Mov.Exh. 9 p. 81; Mov. Exh. 13 p. 13; Mov.Exh. 43 p. 10).

In his amended motion, appellant claimed that the prosecutor's argument that the repeated shouts of "Get him" after appellant shot Egley were directed at getting White was false (PCR L.F. 127-128). He claimed that counsel was ineffective for failing to object to this argument (PCR L.F. 127). Counsel Estes testified that his failure to object to this argument was "a mistake" and that it "just didn't dawn" on him at the time to object (PCR Tr. 620). The motion court denied the claim, finding no prejudice (PCR L.F. 498-499).

On appeal, appellant claims that this argument was false because "the evidence in both phases demonstrated that the 'get him' comments referred to one of the charged victims. . . and that Michael did not see White, who was outside" (App.Br. 92). However, none of the transcript pages that appellant cites specifically support this argument. The record actually shows that appellant's single "Get him" directed towards Egley was not the same repeated "Get him" that White heard: Egley was still alive and running toward appellant when appellant said "Get him" the first time, while White did not see Egley at all prior to hearing appellant say "Get him" repeatedly (Tr. 604-606, 1036-1037). White saw appellant's gun pointed down over the counter prior to saying "Get him" repeatedly, suggesting that he had already shot Egley for the final time before saying it (Tr. 605-606). Bulington claims that she said "What did you do that for?" after appellant said "Get him" about Egley, but White never heard her say that (Tr. 606, 611, 1039). White heard appellant shoot at Egley behind the counter at least four times prior to hearing the "Get him"s, while appellant had not shot Egley at all when he told Bulington "Get him" (Tr. 605-606, 1037).

The different versions of Bulington's and White's observations supports the reasonable inference that appellant said "Get him" on two different occasions: first, directed at Egley prior to shooting Egley the first time, and second, after shooting Egley the final time, which may have been directed towards White, who could see appellant through the window, making it possible that appellant could see him (Tr. 605). A prosecutor may argue the reasonable inferences from the evidence. Middleton, 103

S.W.2d at 742. Because the reasonable inference from White's testimony was not inconsistent with Bulington's testimony, the prosecutor did not present a false argument, and any such objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. Id. at 741.

4. Photographs

Prosecutor Fusselman used four photographs during closing argument to show how the number and quality of gunshot wounds supported the inference that appellant deliberated in the murders (Tr. 920-921). There was no objection (Tr. 921).

Appellant claimed that counsel was ineffective for failing to object to the use of the photographs in closing argument as inflammatory (PCR L.F. 129-130). Counsel Estes testified that he did not object because the photographs were all in evidence (PCR Tr. 621).

The motion court denied the claim, ruling that the photographs were admissible and that there was no prejudice (PCR L.F. 499-500).

Appellant claims on appeal that counsel was ineffective for failing to object because the prejudicial effect of the photographs outweighed their probative value and because the injuries did not tend to prove a fact in issue (App.Br. 93-94). However, as explained in Point VI, supra, the photographs were admissible to show the nature, location, and extent of the wounds, the cause of death, and the condition of the deputies' bodies, to help Dr. Dix explain the autopsies so that the jury could better understand his testimony, and to demonstrate from the number and quality of shots that appellant deliberated in the murders (Tr. 580-591, 920-921). See State v. Ervin, 979 S.W.2d 149,159 (Mo.banc 1998), cert. denied 525 U.S. 1169 (1999)(multiple wounds to the victims support an inference of deliberation). Therefore, appellant failed to show that the prosecutor could not use these admissible and relevant photographs to argue that

appellant deliberated. Thus, counsel's failure to object could not be ineffective, as counsel is not ineffective for failing to make a meritless objection. Middleton, 103 S.W.2d at 741.

5. Alleged Attacks on Defense Counsel

In the rebuttal argument, prosecutor Ahsens stated the following:

> Did you hear, were you listening when it was suggested to you that if this had been deliberation then Leon Egley would not have been moving after the first shot? Well, if that's true, then since Jason Action was shot dead with the first shot and never moved, does that mean there must have been deliberation there? Do you see the inconsistency in the argument? See the attempt to fool you? It's not point blank range. Three to four feet. Measure it out if you want to. I suggest to you that's point blank range.
>
> Cool, been cool reflection, it would have been successful. What incredible sophistry is that? They intended to do this. They intended to do this by force of arms.

(Tr. 942-943). Counsel did not object at the time, but tried to object and move for a mistrial after the argument which was overruled (Tr. 943, 946-948).

In his amended motion, appellant claimed counsel was ineffective for failing to object to the argument as the argument was an improper attack on defense counsel

(PCR L.F. 129-130). Counsel Estes testified that he did not object because he had not heard the argument, but would have wanted to object had he heard it (PCR Tr. 621-622). The motion court denied the claim, finding that the comments were permissible comments on defense counsel's tactics or techniques (PCR L.F. 500).

Appellant claims on appeal that the argument was improper, suggesting "that counsel had lied to the jury" and that the prosecutor "had special, personal knowledge" of appellant's guilt (App.Br. 95). This claim is meritless. Comments directed at the tactics and techniques of the defense are permissible. State v. Collins, 150 S.W.3d 340, 350 (Mo.App., S.D. 2004); State v. Reyes, 108 S.W.3d 161, 170 (Mo.App., W.D. 2003); State v. Hanson, 974 S.W.2d 617, 619 (Mo.App., E.D. 1997). The statements of the prosecutor were not personal attacks, but attacks on counsel's argument that Deputy Egley "would not have gotten up if this was a crime where there was cool reflection because you would have had Mike coming back and shooting both of them in the head a point blank range" (Tr. 927). Counsel made this argument even though he had earlier said that appellant "certainly wasn't coolly and calmly reflecting on whether or not to shoot Jason Acton," whom he did kill with one shot at point blank range (Tr. 923). Thus, the prosecutor was pointing out the blatant inconsistency that the killing with one shot would have shown deliberation toward Egley but not toward Acton. Because the comments were directed at the defense argument, they were permissible comments on defense tactics and techniques, and were therefore not objectionable. Counsel is not ineffective for failing to make an meritless objection. Middleton, 103 S.W.2d at 741.

6. Alleged Comment on Right to Remain Silent

At the end of the defense closing argument, prosecutor Ahsens opened his rebuttal argument as follows:

> He said he was sorry. I think that's going to be precious little consolation to deputy Acton and deputy Egley. He said he was sorry after he was caught. He said he was sorry after he was cornered. He said he was sorry when he knew he was facing prosecution for murder in the first degree.

(Tr. 938). Later, the prosecutor said, "And somehow because he shows remorse there's no deliberation? Well, he didn't show remorse until he got caught. We only know, they say there's remorse because he says it. We don't know whether that's true or not" (Tr. 943). Appellant did not object to this argument (Tr. 938).

In his amended motion, appellant claimed that counsel was ineffective for failing to object to this argument, as it was an improper comment on appellant's right to remain silent, and was otherwise inflammatory and irrelevant (PCR L.F. 131-132). Counsel Estes testified that he objected to this argument, but his objection was late (PCR Tr. 624).[11] The motion court denied the claim, finding that the argument was a rebuttal to appellant's argument that his "remorse" meant he did not deliberate, and that the

[11]The objection also did not match the claims appellant now makes (Tr. 938).

argument did not implicate appellant's right to remain silent (PCR L.F. 500-501).

On appeal, appellant claims that this argument was improper because it was irrelevant and highly inflammatory and because it "told the jury to consider Michael's failure to come forward and to express remorse until he was caught," thus commenting on appellant's right to remain silent (App.Br. 96). This is meritless. First, appellant was the one who made his alleged remorse relevant by arguing extensively that his remorse showed that he had not deliberated (Tr. 930-932, 935-936). A prosecutor is allowed to rebut defense counsel's questionable line of argument. State v. Jones, 979 S.W.2d 171, 177 (Mo. banc 1998), cert. denied 525 U.S. 1112 (1999). If appellant's expressions of remorse could be considered relevant on the issue of deliberation for the defense, the prosecution had the right to draw a different inference based on the evidence of a lack of remorse towards his victims during the commission of the crimes. Further, placed in their proper context, the comments of the prosecutor that appellant was remorseful only after he was caught were not comments on appellant's failure to come forward sooner to express remorse, but of his failure to show mercy and to his victims and remorse by fleeing the scene after the crime, only showing remorse when he knew he had no other option (Tr. 938-939, 943). This statement has nothing to do with appellant's remaining silent, but with what he said when he chose not to remain silent. As such, the argument did not implicate appellant's right to remain silent, but was a comment on the credibility of his out-of-court statement. State v. Burrell, 944 S.W.2d 948, 950-51 (Mo.App., W.D. 1997). Thus, counsel was not ineffective for failing to object, as such an objection would

have been meritless. Middleton, 103 S.W.2d at 741.

For the foregoing reasons, appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that the denial of the guilt-phase claims of appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 18,708 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 22nd day of July, 2005, to:

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